IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 66

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and WABASH RAILWAY COMPANY,

Petitioners,

vs.

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL *et al.*,

Respondents.

No. 67

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL *et al.*,

Petitioners,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and WABASH RAILWAY COMPANY,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY AND WABASH RAILWAY COMPANY.

JOHN C. COOK,
BURTON HANSON,
Counsel for Chicago, Milwaukee & St. Paul Railway Company.

WINSLOW S. PIERCE,
LAWRENCE GREER,
ROBERT J. CARY,
F. C. NICODEMUS, JR.,
Counsel for Wabash Railway Company.

C. G. Burgoyne Printing Business, 39-41 Cortlandt St., New York

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 278.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and WABASH RAILWAY COMPANY,
Petitioners,

vs.

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL et al.,
Respondents.

No. 279.

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL et al.,
Petitioners,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and WABASH RAILWAY COMPANY,
Respondents.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF OF CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY AND WABASH RAILWAY COMPANY.

The brief and argument filed in this cause by counsel for the Des Moines Union Railway Company and F. M. Hubbell and F. C. Hubbell, is not

responsive in its fundamentals to the brief filed by the complainants. Where reference is made to the argument of the complainants, comment is addressed to quotations, detached from their context, taken from the separate briefs filed by them in the Circuit Court of Appeals.

No attempt has been made to approach the issues upon the theory followed by the majority opinion of the Court of Appeals, or upon the basis of the argument presented by the complainants in the analysis of the facts offered in answer to such theory or of the several points made respecting the same.

Nor do we find in their brief any reference whatsoever to the dissenting opinion of Circuit Judge Hook.

One gathers from a reading of the brief that the conclusions of counsel are based upon the supposition that the trust admittedly created by the contract of January 2, 1882 was abandoned because of the incorporation of the Des Moines Company, and of the conveyance to such Company of the various terminal properties acquired by the temporary trustees.

In this respect counsel have not attempted to reply to the reasons presented in the brief of the complainants showing that the incorporation of the Des Moines Company, the several resolutions of its stockholders and directors, the resolutions of the proprietary companies and the deeds of conveyance, made to the Des Moines Company as a result thereof, were a development in corporate form of the trust created by the parties to the contract of January 2, 1882.

The brief is based wholly upon the supposition that the trust created by the contract of January

2, 1882 would necessarily be destroyed because of the several conveyances in fee simple to the Des Moines Company of the terminal properties, the titles to which were assembled in the names of the temporary trustees.

All subsequent discussion is based upon this supposition.

For instance, the analysis of the Amendments to the Articles of the Des Moines Company proceeds on the stated theory that they represent the thought that it was intended that the defendant company theretofore acquired absolute title to the terminal properties, and that thus such amendments are corroborative thereof.

In view of such a situation, it is submitted that it would serve no useful purpose in clarifying argument to review in detail the several points attempted to be made by counsel for the Hubbells. It is submitted that they have all been anticipated and adequately answered in the original brief filed on behalf of the complainants, and that therefore this reply can be made responsive in the best sense by analyzing a case recently decided by this Court, showing that counsel for the Hubbells have wholly misconceived the true principles governing the issues involved.

In the case of *Chicago, Milwaukee and St. Paul Railway Company* vs. *Minneapolis Civic and Commercial Association*, 247 U. S. 490 this Court determined the status of the parties in the instant case upon a set of facts so coincident in fundamentals and detail with the facts now before the Court that the opinion there rendered could be applied without substantial alteration as decisive of the case at bar.

This Court in an opinion written by Mr. Justice Clarke delivered June 10, 1918, subsequent

to the decision of the Circuit Court of Appeals in this case held that the Minneapolis Eastern Railway Company, a Company developed in the interest of two trunk lines entering Minneapolis, which jointly owned its capital stock, was not an independent corporation and had no power to publish tariffs covering service over its lines which the proprietary companies themselves might render.

Although the decision is fresh in the minds of the Court, a brief restatement of the facts will emphasize its coincidence with the case at bar.

The Minneapolis Eastern Railway Company, referred to herein as the Eastern Company, was organized under the laws of Minnesota as a railway company to construct and operate a railway from Minneapolis to St. Paul. It was organized as an independent corporation by a group of mill owners, and, unlike the Des Moines Company, it was not organized by, or in the interest of, or to take title to properties owned by the other railway companies which became its proprietors.

After the organization of the Eastern Company had been completed, but before any right of way had been acquired or any construction work done, the Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, referred to herein collectively as the proprietary companies

> "came into exclusive control of the corporation and a board of directors satisfactory to them was elected, with the result that the only road which the company ever built or operated (omitting small fractions) was one mile of main track and one mile and a half of yard track and sidings in the City of Minneapolis" (p. 494).

Although the Eastern Company, like the Des Moines Company, was incorporated as a railroad company, and not as a terminal company, it became in point of fact the corporate instrumentality of the proprietary companies whereby, to avoid duplicating terminal facilities in a congested district, they were enabled

> "to construct and operate but one track to the group of industries to be served, instead of each building and maintaining its own track, and to construct and use that track in common so that each might have the benefit of it as fully as if it were the sole owner" (p. 500).

There is here to be noted a significant point of difference in the facts of the two cases:

The Des Moines Company was organized for the sole purpose of holding legal title to the facilities in Des Moines to be used in common by the railway companies which became the owners of its stock, and this purpose was declared in the definite provisions of the contract of January 2, 1882, which was embodied in its Articles of Incorporation as the statute law of its existence. No such declaration of purpose was made by the Eastern Company either at the time of its incorporation or subsequently, but this Court nevertheless found as a fact that such was the purpose for which it was originally acquired and afterwards utilized by the proprietary companies; and made this finding by reason of a series of acts and circumstances which, curious as it may seem, are strikingly like those which the Circuit Court of Appeals held in the case at bar, effected an unintended and unexpected destruction of the proprietary interests of the present complainants or their predecessors in the properties held by the Des Moines Company.

We quote further from this Court's opinion:

"Almost immediately after the organization of the Eastern Company, the three companies entered into a written contract, effective for over 39 years, until May 1, 1918, which is of much significance in determining the decisive fact in the case, as we have stated it.

"This contract provides:

(1) That only 300 shares of the authorized 10,000 shares of capital stock of the Eastern Company shall be issued, and of these, 75 shares each must be issued to the Omaha and Milwaukee Companies, 145 shares to a trustee for the Eastern Company, and the remaining 5 shares shall be issued as qualifying shares to directors. The 145 trust shares 'shall not be transferable except by the written consent of all (3) said parties hereto, and any transfer thereof without such consent shall be void and of no force or effect.'

(2) The Eastern Company shall execute in proper form 150 bonds of $1,000 each and a mortgage on all the property and franchises of the company to secure their payment. The Milwaukee and Omaha Companies agree each to purchase, at 80% of their par value, one-half the amount of such of these bonds as it may be necessary to issue to pay for the right of way, construction and equipment of the railroad;

(3) That the Milwaukee and Omaha Companies shall have 'equal and the same rights in and to the said railway . . . in all respects;' that they shall pay the same charge for switching their respective cars by said railway, and that no partiality or favor shall be shown to either;

(4) That the superintendent having charge of the operation of the railroad, shall be appointed 'by the consent and mutual agreement of all the parties to these presents;'

(5) That the Eastern Company shall

charge all parties one dollar for switching each loaded car, but a rebate of fifty per cent. of this charge shall be made to the Milwaukee and Omaha Companies;

(6) If any other company having equal facilities with the Eastern Company for reaching mills in Minneapolis shall promptly and satisfactorily do the switching for the second and third parties (the Milwaukee and Omaha companies) then the Eastern Company with the written consent of the Omaha and Milwaukee Companies, will do switching for such railroad companies over the said railroad of the Eastern Company on the same terms that switching is done for the said second and third parties (the Milwaukee and Omaha Companies) over such railroad but without rebate to any company" (pp. 495-496).

The agreement here summarized is so similar in its basic aspects as well as in detail to the supplemental agreement of May 10, 1889, between Des Moines Company and its proprietors, as strongly to suggest that it may have been utilized as a model by the draftsman of the latter instrument.

Like the supplemental agreement of May 10, 1889, it provided for the issue of the stock of the company in quarters, each quarter representing or evidencing a proprietorship equivalent to an equitable tenancy in common, one of these quarters being allotted to each of the proprietary companies and the surplus quarters being issued to a "trustee for the Eastern Company." The nature of the trust is not disclosed, but it is not improbable that the parties intended that the surplus quarters might be sold to other trunk line companies desiring to use the facilities of the Eastern Company, as in the instant case was provided in

section twenty-four of the supplemental Agreement of May 10, 1889.

Provision was also made for the control and operation of the properties of the Eastern Company by representatives of the two proprietary companies, the stipulations in this respect being substantially the same as those provided in sections eleven, twelve and thirteen of the Supplemental Agreement of May 10, 1889.

Summarizing the effect of the above mentioned provisions of the Agreement, this Court said:

> "It deprived the Board of the power: to issue the capital stock of the company and to finance its affairs; to select a superintendent to operate the company's two and one-half miles of track, by requiring that such selection be made only with the consent and mutual agreement of the three companies; to make mutual agreements for the interchange of business with any other company except with the mutual consent of the Milwaukee and Omaha Companies; and it renders one-half (save five shares) of the stock which it permits to be issued, transferable only with the written consent of the Milwaukee and Omaha Companies. Thus, the making of this contract was an obvious surrender by the Eastern Company of substantially all freedom of corporate action and an assumption of control over that company by the Milwaukee and Omaha Companies, which converted it largely into a mere agency or instrumentality for doing their bidding" (pp. 496-497).

It will be recalled that the Des Moines Company was repeatedly declared by the Hubbells to be precisely such an agency or instrumentality in the reports made year after year under oath to the taxing authorities of the State of Iowa, which re-

ports were made subsequent to every transaction which they now claim was destructive of the trust.

This Court then recites certain acts of administrative control exercised thereafter by the proprietary companies, among these being the division of an accumulated surplus of $95,000 equally between the two proprietary companies in the form of a stock dividend, the purchase by the proprietary companies in equal proportions of certain refunding bonds issued by the Eastern Company, and submits the following conclusion:

> "With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carrying charges upon the public" (p. 498).

Without underestimating the difficulty of conceiving as an original proposition a plan of joint control more complete and effective than the plan above outlined, credit for such an accomplishment is due the organizers of the Des Moines Company for the following reasons, among many others:

> (a) The Des Moines Company was created without corporate power or capacity to take title to the terminal properties in Des Moines, except upon a trust to hold the same in perpetuity "subject to the joint use and occupation of" the proprietary companies, for its Articles of Incorporation are premised upon the terms of the contract of January 2, 1882, which is recited in the same in full as a preamble, and it is further provided that all powers

exercised by such Company shall be in accordance with the terms and the spirit of the aforesaid contract.

There was no such limitation upon the corporate power of the Eastern Company.

(b) The original Articles of Incorporation of the Des Moines Company vested the management of the affairs of the Company in a Board of eight Directors, all of whom were to be nominated by the proprietary companies, or any grantees or assignees of either of them, and the Board of Directors was not permitted to make any contract, lease, or other agreement amounting to a permanent charge on the property of the Des Moines Company without the approval of the three proprietary companies or their assignees, and without further approval of the holders of more than three-fourths of the stock of the Des Moines Company.

There was no such limitation upon the power and authority of the stockholders and Board of Directors of the Eastern Company.

(c) Substantially all of the provisions of the tripartite agreement between the Eastern Company and its proprietary companies which are summarized in the extracts from the opinion of this Court quoted above are embodied in the Supplemental Agreement of May 10, 1889, between the Des Moines Company and its proprietors, and there are superadded thereto further and more stringent provisions evidencing the identity of the stock interest and property interest of the proprietary companies, among these being (1) the provision requiring the stock of the Des Moines Company to be issued in quarters represented by single certificates, *all* of which were to be non-transferable, without the unanimous consent of the proprietary companies; (2) the provision admitting a railway company becoming the purchaser of a surplus quarter interest in the stock of the company to the use and occupation of the terminal

properties of the Des Moines Company on a parity with the three original proprietors; and(3) the provision that in case any difference should arise between the parties respecting any matter *not* expressly provided for in the Agreement, the same should be referred to a board of arbitration to be determined not upon the basis of the legal rights of the Des Moines Company, as the holder of the legal title to the terminal properties, but upon principles of justice and equity.

Following the enumeration of the facts which, in its opinion, establish the character of the Eastern Company as the mere corporate agency or representative of the two proprietary companies, facts which manifestly fall far short of the facts disclosed in the case at bar, this Court further says:

"To accomplish this end they resorted to the familiar device of incorporating the Eastern Company, and in order that their purpose might not be defeated in the future, by the design or business necessity of either company, the contract between them which we have discussed, was entered into to prevent the corporate organization of the Eastern Company and the control of its operations from being changed by either owning company without the consent of the other, and the evidence makes it very clear that all through its corporate life the Eastern organization has been consistently used as a mere agency of the two owning companies to accomplish their original purpose.

"Much emphasis is laid upon statements made in various decisions of this Court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company

the owner of the property of the other, or create the relation of principal and agent or representative between the two. *Pullman's Palace Car Co.* v. *Missouri Pacific Ry Co.*, 115 U. S. 587; *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364, 391; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 413; *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 108; and *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516, 529, 530, and it is argued that since the order of the Commission requires that the tracks, the title to which is in the Eastern Company, be treated as the property of the stock owning companies, the effect of it, if enforced, will be to deprive the Eastern Company of its property without compensation and to render valuless its capital stock owned by the Milwaukee and Omaha Companies.

"While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency of instrumentality of the owning company or companies. *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S., 257, 273, and *United States* v. *Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516. In such a case the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.

"Satisfied as we are by the evidence that the Eastern Company is a completely controlled agency of the two companies which

> own its capital stock, we agree with the Supreme Court of Minnesota that the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Eastern Company should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning companies" (pp. 500-501).

From the foregoing it is quite clear that this decision must control the case at bar, unless it is distinguishable by reason of the fact that at the time the decision was rendered the whole capital stock of the Eastern Company was held apparently in equal proportions by the proprietary companies, whereas in the case at bar a part of the capital stock of the Des Moines Company is now claimed to be owned by the defendants Hubbell.

To urge such a distinction is to ignore the underlying principle of this Court's decision.

This Court held that the Eastern Company was organized and established by the two proprietary companies as a convenient and customary means of creating a tenancy in common in the railway property held in legal title by the Eastern Company "so that each might have the benefit of it as fully as if it were the sole owner."

The proprietary interest was represented by shares of stock of the Eastern Company issued to the proprietary companies, and at the date of this Court's decision the tripartite agreement between the Eastern Company and the proprietary companies had expired and the sole evidence or indicia of their title to and right to use and enjoy the common property was the certificates of capital stock of the Eastern Company. In other words, this Court disregarded the conventional status of the shares and held that in the

possession of the proprietary companies such shares represented a right to the common use and enjoyment of the properties held by the Eastern Company precisely as if that right had been definitely expressed upon the face of the stock certificates themselves.

The Des Moines Company was organized under substantially the same conditions as the Eastern Company and for the same purpose, and its capital stock was allotted to the proprietary companies for the same purpose as the stock of the Eastern Company was allotted to its proprietary companies, and, curiously enough, in the same identical proportions.

It is true that at a subsequent date certain shares of the Des Moines Company passed from the control of the proprietary companies into the hands of the defendant Hubbell, but this was not intended to destroy, and, in the nature of things, could not destroy the right of user or the equitable estates inhering in and represented by the shares retained by the proprietary companies for the reason—if for no other reason—that the parties themselves expressly so stipulated.

At the time the Purchasing Committee sold three one-eighth interests to the defendant Hubbell, retaining one-eighth in its own treasury, it was expressly agreed, as we have repeatedly pointed out in our original brief, "that a one-eighth interest in the capital stock should be sufficient to represent a proprietorship in the company" (Rec., 1603).

Moreover, even if there had been no express agreement of this character, the Court, in order to sustain the transaction, would be obliged to imply one. It is quite evident that the Milwaukee Company and Omaha Company could not now de-

feat the deliberate judgment of this Court by the simple device of selling to an individual, much less an individual who is an officer and director of the Eastern Company, a portion of their stock of the Eastern Company. If such a transaction were presented surely this Court would hold that the Milwaukee Company and the Omaha Company had no corporate power to alienate their interest in the corporate property of the Eastern Company by a transfer of their shares of stock of the Eastern Company, thereby disabling themselves in the performance of their public duties and in the exercise of their corporate franchises. Such a transaction if not held void would be construed as implying a reservation in the Omaha Company and the Milwaukee Company of every right of user represented by their original allotments of stock.

Certainly there is no substantial reason why an eighth stock interest in the Des Moines Company should not be given the same attributes as a one-quarter or a one-half stock interest in the Eastern Company—especially as the record in this case makes it abundantly clear that all of the parties so intended.

To argue further that the parties always intended that an allotment of stock in the Des Moines Company, originally an allotment of one-quarter and subsequently an allotment of one-eighth, should represent a proprietorship, is surely unnecessary. The evidence on this point is overwhelming.

In this connection, we desire, however, to refer again to the provisions of the Articles of Incorporation of the Des Moines Company attempted to be amended at the illegal stockholder's meeting of April 8, 1890.

Article IV provides that

> "At all future elections of directors it shall require the votes of more than seven-eighths of all the stock theretofore issued to elect any director."

The same Article provides that

> "With respect to the matters above mentioned, and all other matters, except the ordinary operation of the property, the Board of Directors can act only upon the unanimous vote of eight members thereof."

And Article IX provides that the Articles may only be amended by a vote of "more than seven-eighths of all the stock in favor thereof."

These provisions give a veto, amounting to a power of strangulation, to a vote of one-eighth of the stock of the Des Moines Company.

What conceivable reason could there be for giving to an eighth stock interest a veto power of this character in perpetuity, unless it be given as supplementary to or complementary of a proprietorship of which the primary attribute is a right to use and occupy the terminal facilities of the Des Moines Company in common with other proprietary companies as contemplated and provided for by the express provisions of the contract of January 2, 1882.

The theory upon which counsel for the defendants have developed their brief, namely, that there is great significance in the fact that the temporary trustees conveyed to the Des Moines Company titles in fee simple to the properties assembled for the proprietary Companies under the trust instrument of January 2, 1882, with the supposed result that such absolute conveyances were incon-

sistent with the establishment and continuance of a trust in the Des Moines Company, is cast in a series of questions beginning on page 264 of their brief, relating to subject matters upon which it is suggested that counsel for the complainants have been silent.

It is submitted that the queries raised by such questions have been fully disposed of, in our original brief, under Points I, II, V and VI, discussing the plan of the trust created, the reasons for the conveyance of complete legal titles in the trust properties to the Des Moines Company, and the harmonious relationship of the subsequent acts and circumstances to the trust thus created and developed.

Nevertheless, at the risk of repetition, we desire to answer categorically the questions thus submitted:

> Question (1). "If the organization of the defendant company was for the sole purpose of providing the corporate trustee referred to in the contract of 1882, as claimed on pages 99-100 of their argument, why did they organize a corporation having the power and assuming the obligation of a Railway Company and why did they organize a corporation for pecuniary profit?"

Previous to the making of the contract of January 2, 1882, the terminal properties acquired in the common interest of the three proprietary companies were held in the names of two corporations and two individuals. These properties were intended to be used for railroad purposes. It was, therefore, essential that they be concentrated in a railroad corporation having power to exercise all the prerogatives and to perform all of the functions of a common carrier, to the end that the

proprietary companies might effectively enjoy for railroad purposes the properties acquired and held for their common benefit. Furthermore, it was essential that these properties be conveyed to a single railroad corporation, to make practicable the mortgaging of the same and the issuing of bonds, in compliance with the terms of the trust instrument. An identical course was pursued by the organizers of the Eastern Company in the case of *Chicago, Milwaukee and St. Paul Railway Company* v. *Minneapolis Civic and Commercial Association*, above analyzed.

A railway corporation for pecuniary profit was organized because no other corporate form of railway company was possible under the laws of Iowa and, furthermore, because under paragraph Tenth of the trust instrument (Rec., p. 413) it was provided that railroad companies other than the proprietary companies might be entitled to the use of all of said terminal facilities upon the payment of a fair sum for rental and (their) its proportion of the maintenance account."

> Question (2a). "If it was the purpose to transfer to the defendant Company simply the legal title to the Terminal property then why the following:
>
> Why did the Des Moines Northwestern Railway Company, in whose name the title to no part of the Terminal stood, in January, 1895, (1885) pass a resolution authorizing its officers to transfer to the Terminal Company all of its interests in the Terminal Company of whatever kind and character?"

In vesting the trust properties in a corporate trustee, as provided for by the trust instrument, it was appropriate that the proprietary companies should as they did do on January 1, 1885, take

coincident corporate action with this end in view. In this respect, the resolutions adopted by the stockholders of the Northwestern Company, on January 1, 1885, were identical with the resolutions passed by the St. Louis and Northern Companies on the same date. By these several resolutions, each proprietary company in unequivocal terms accepted the incorporation of the Des Moines Company as the corporate trustee provided for by trust instrument, and it was appropriate that concerted action be taken by the proprietary companies to vest in such corporate trustee the trust properties assembled in the names of the temporary trustees. Thus, in a determination of the character of estate intended to be conveyed by the proprietary companies to the Des Moines Company, it is without significance that the stockholders of the Northwestern Company adopted the above resolution, notwithstanding, that it had taken title to no part of the trust properties. *On the other hand, the fact that the Northwestern Company did not, as both shown and asserted by counsel for the Hubbells on pages 67 and 70 of their brief, make any deed of conveyance of any kind or character to the Des Moines Company is highly significant in demonstrating that the proprietary companies did not intend to convey their equitable estates in common to the Des Moines Company, for as this Court has said in Brown* v. *Fletcher, 235 U. S. 589, an equitable estate is an estate in property to the same extent as if the legal title thereto were vested in the beneficiary and such an estate passes by deed.* It is beyond question, as counsel for the Hubbells themselves state, that the proprietary companies had equitable estates in common in the terminal properties, while the

temporary trustees held legal title thereto. Therefore, if it had been the intent of the proprietary companies that such equitable estates should pass with the legal estates in the terminal properties to the Des Moines Company, the Northwestern Company could have divested itself of its own interests in this respect only by proper deed of conveyance.

> Question (2b). "Why did the Northwestern Company, the Northern Company and the St. Louis Company, each, in their resolutions of January, 1885, authorizing their officers to convey this property, use this language: 'convey, assign and transfer to said company all its right, title and interest of whatever name and character in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the City of Des Moines east of Farnham Street in said City now held, enjoyed or claimed by either or all of the signatories of said contract of January 2nd, 1882, or any agent or trustee thereof purchased, acquired, or held in pursuance of said contract.' (Rec., Vol. II, p. 427.)"

The proprietary companies established their trust by virtue of the contract of January 2, 1882. The Des Moines Company became the corporate trustee provided for in this contract, both by express declaration of the incorporators and by virtue of the recital of the trust instrument in the Articles of Incorporation and the declaration contained in Article 2 that "all the powers exercised by this Company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882." The Des Moines Company in its resolution of January 1, 1885, accepted the trust and directed

its officers to procure the necessary conveyances and transfers to fully invest it with *the title* provided for in the trust instrument. For the purpose of carrying out the terms of the trust as expressly provided by the trust instrument, it was essential that the corporate trustee take legal title to the trust properties in fee simple. The trust estates thus being established and reserved by instruments other than the deeds of conveyance made by the temporary trustees, it was both appropriate and essential that the conveyances made by them should be without reservation.

> Question (2e). "Why did Col. Blodgett, whose integrity and ability are unchallenged, who had lived these transactions and who knew the intention better than can counsel or the Court, in preparing the deed of the St. Louis Company in carrying out these resolutions, prepare a warranty deed, and why did he formulate it so as to convey not only the property which stood in the name of that Company but also 'all of the real estate within the City of Des Moines * * * also all its embankments, bridges, sidetracks, * * * all its railroad property acquired or to be acquired and everything appurtenant to said railroad'?" (p. 458)

The answer to this is covered by our answer to Questions (2a) and (2b), and we may also add that Col. Blodgett, precisely because he was a lawyer of unchallenged ability, prepared the deed of the St. Louis Company in the form stated in the question, knowing that the warranty deed was not to be the instrument within which the trust was to be reserved.

Counsel for the Hubbells, failing to appreciate the significance of the principle here involved,

assert that the embodiment of the trust instrument in the Articles of Incorporation was a "mere solecism" and an "incongruity" (Brief, p. 191).

From their standpoint this is indeed true; and their own admission that their whole argument is utterly inconsistent with the existence of these reservations in the organic law of the Des Moines Company is the best possible demonstration of the complete fallacy of their fundamental contention.

> Question (2d). "Why did the Northern Company in its deed after describing the property which stood in his name use the following language:
>
> 'Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the revrsion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest in the above described property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above described premises, etc.'?" (p. 456).

The answer to this is covered by our answer to Questions (2a) and (2b).

> Question (2e). "Why was it provided in the original articles of incorporation of the defendant Company that its capital stock should be issued in payment for the Terminal property?"

It was for the reason that it was contemplated that the stock would be apportioned among the proprietary companies as evidencing and measuring their respective equitable estates in the com-

mon properties, precisely as was done with the stock of the Eastern Company in the case of *Chicago, Milwaukee and St. Paul Company* v. *Minneapolis Civic and Commercial Association, supra.*

> Question (2f). "Why was it recited in the contract of May 10th, 1889, that the defendant Company owned this property?"

The primary purpose of this agreement was to give assurance to the holders of the bonds issued under the mortgage of the Des Moines Company that the interest on such bonds would be duly and punctually paid by the proprietary companies, and this agreement was formulated and executed primarily as an additional security for the bonds issued under the mortgage, which mortgage also recited that the Des Moines Company was the owner of the terminal properties. Moreover, Judge Hook, in his dissenting opinion calls attention to the fact that such recital of ownership is based upon the provisions of the charter of the corporation and that in such charter is incorporated the trust instrument.

> Question (3). "If the contract of May 10th, 1889, was supplemental to the contract of January 2, 1882, why does it not recite this fact?"

This fact is recited in the resolution authorizing this supplemental agreement and a further recitation of the fact was unnecessary, especially in view of the fact that the agreement is fundamentally a supplemental agreement, in that it only provides for the details of operation of the terminals for the period of thirty years, whereas, the contract of January 2, 1882, is perpetual. In connection with this subject matter, we wish to refer

to the assertion in the brief of counsel that we have misquoted the resolution authorizing the supplemental agreement by stating that it provided for a thirty year agreement, whereas, the record in fact shows that the resolution provided for an agreement not for *thirty years* but for *three years.* (Brief, pp. 266-268.) It is true that the record is as stated by counsel for the Hubbells, but it obviously contains in this respect a typographical error which has been treated as such from the inception of this litigation, and no suggestion was ever made in oral argument or printed argument, of which we are aware, that the fact was otherwise.

In concluding our reply argument we especially direct this Court's attention to that division of the brief of counsel for the Hubbells (pp. 258, 259) where they defend their alleged title to the five-eighths stock interest in the Des Moines Company which they took from the treasury of the consolidated company under the several transactions analyzed in Point VII of our original brief.

Their defense of these transactions is not even a plea in confession and avoidance; it is indeed a plea of guilty.

The statement that the mortgage debt to the Metropolitan Trust Company through whom the St. Paul Company claims title has long since been paid is not true. The record shows that the mortgage to the Metropolitan Trust Company was duly foreclosed, that the bondholders themselves were forced to buy in the property and that there was a substantial deficiency which ought to have been satisfied by application of the unmortgaged assets wrongfully appropriated by the Hubbells (Rec., 651).

The Hubbells are, however, mistaken in assuming that the security holders of the defunct consolidated company are alone entitled to complain of the breach of trust. As we pointed out in our original brief (Points VI and VII), the consolidated company as one of the equitable tenants in common was itself subject to all the disabilities of a fiduciary in dealing with aliquot interests in the trust properties and the defendants Hubbell stand in no better position than their controlled vendor.

The Hubbells do not attempt to controvert this proposition, and we submit that it is incontrovertible.

To emphasize and illustrate the application of this proposition we refer again to the case of *Chicago, Milwaukee and St. Paul Railway Company* v. *Minneapolis Civic and Commercial Association, supra.*

Let it be assumed that an individual who was an officer and director of the Eastern Company and also a director of one or both of the proprietary companies by a series of transactions that were fraudulent *per se* and confessedly in violation of the express provisions of the tripartite agreement had obtained possession of the 145 shares (the two surplus quarters) of the stock of the Eastern Company which under the terms of the tripartite agreement had been issued to "a trustee for the Eastern Company" and let it be further assumed that this individual should assert that his possession and alleged ownership of these shares established the autonomy and independence of the Eastern Company so that it was free to do what this Court held that it could not do in the case in question. Would any lawyer seriously

contend that the two proprietary companies, upon a discovery of the fraudulent character and object of the transaction, would not be entitled to a rescission of the transaction and a restoration of the *status quo ante?*

The fact that such relief in the instant case will deprive the Hubbells of any legitimate profit which they might still realize by transferring the shares to other railway companies is of no consequence. Equity is indifferent to the ill-fortunes of a faithless fiduciary. As the Hubbells, lured by the hope and expectation of inordinate gain, elected to ignore the requirements of conscience and good faith and set about deliberately to destroy property interests of immense value belonging to their *cestuis que trustent,* surely they will not be heard to complain if at the end of a long, tedious and costly litigation a court of equity should give the injured *cestuis* their full and complete measure of equitable relief.

Finally attention should be called to the fact that such complete measure of relief cannot be given the complainants with the continuance in the Hubbells of the five-eighths stockholding interest in the Des Moines Company now claimed to be owned by them, for any decree which protects the right of user belonging to the complainants as equitable tenants in common of the terminal properties and still leaves the Hubbells identified with, or in control of, the corporate activities of the Des Moines Company without responsibility in this respect either to the public or to the complainants, and with power to exploit such control in furtherance of the private real estate operations of F. M. Hubbell and Son in the industrial precincts of the City of Des Moines, would both perpetuate

a situation in principle indefensible and create paralysis in the legitimate development of the trust enterprise and in the performance by the proprietary companies through it of their duties to the public.

The brief and argument of counsel for the Hubbells upon the controversy as to the so-called surplus earnings, is equally as unresponsive as their argument on the main case. We have nothing to add to the argument in our original brief on this controversy, except to reiterate our belief that it involves no public interest and no rule or principle of law which public interest requires this Court to determine, and that the writ of *certiorari* issued on petition of the Hubbells may properly be dismissed.

In the brief of counsel for the Hubbells (p. 269), they question the statement in our original brief that these accumulations now amount to approximately $2,000,000.00, and say:

> "There is nothing in the record to sustain this statement and it is not true as a matter of fact. The record does show that a substantial sum involved in this issue."

As we stated in our original brief, the record does not show the amount of these accumulations at the present time, the testimony having been taken a number of years ago.

It seems proper, however, that this Court should be apprised of the precise condition of the case at the time of the argument, relying in this

respect upon the good faith of counsel. The fact is that on December 31, 1917, these accumulations, as reported by joint accountants employed to audit the books of the Des Moines Company, amounted to $1,730,582.58. The subsequent accretions, including interest on the fund, practically all of which is in cash, should bring the present total to a figure well above $2,000,000.00.

All of which is respectfully submitted.

JOHN C. COOK,
BURTON HANSON,
Counsel for Chicago, Milwaukee & St. Paul Railway Company.

WINSLOW S. PIERCE,
LAWRENCE GREER,
ROBERT J. CARY,
F. C. NICODEMUS, JR.,
Counsel for Wabash Railway Company.